No. 9531

IN THE

# United States
# Circuit Court of Appeals

For the Ninth Circuit

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EARL CANNING,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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**Upon Appeal from the District Court of the United States for the District of Arizona**

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# Brief for Appellee

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REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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## STATEMENT

Appellant's brief presents nine questions (pp. 22-24). We will take them up in the same order in which they appear in appellant's brief. In discussing some of the questions raised, it will be necessary to refer to testimony of some of the witnesses insofar as it affects the appellant Canning. In the interest of brevity we

shall, therefore, make no statement of the facts at this time, as we feel that our later reference to the facts will be sufficient for this Court to determine all the questions raised.

## ARGUMENT

### I.
### (Appellant's Brief, pp. 24-30)

### IS THE INDICTMENT FATALLY DEFECTIVE?

Appellant's first attack on the indictment is based on the use of the word "would". It is contended that the indictment fails to allege that the defendants ever did any of the things which the indictment alleges the scheme contemplated they would do.

In an indictment charging violation of the mail fraud statute, it is only necessary to allege that a scheme was devised to obtain money by false or fraudulent pretenses, representations or promises. It is not necessary to allege the success of the scheme or that any of the things contemplated were actually performed. The devising of the scheme and the use of the mails in furtherance thereof complete the offense. The use of the mails is the gist of the offense.

*Brady* v. *United States,* 24 F. (2d) 399;

*Hass* v. *United States,* 93 F. (2d) 427.

This indictment is not measured by the same rule as one charging the obtaining of money under false pretenses.

*Emanuel* v. *United States,* 196 Fed. 317.

In the present case, defendant Canning was convicted on the Sixth Count of the indictment charging conspiracy. In that count the overt acts are alleged.

The appellant also attacks the indictment on the ground that it is duplicitous. The indictment charges but one scheme—that was the scheme for sale of the stock and securities of the State Securities Corporation by false and fraudulent representations. The purchase or the organization of a life insurance company was not another scheme but merely one of the means used for the carrying out of the scheme for the sale of the securities of the State Securities Corporation. We quote from the indictment:

> "It was further a part of said scheme and artifice to have the State Securities Corporation purchase and obtain control of the Insurance Company, for the purpose of aiding said defendants in the sale of stocks and bonds of said Corporation to the persons to be defrauded by means of false and fraudulent pretenses, representations and promises." (4)*

Appellate courts have upheld similar indictments.

*Silkworth* v. *United States,* 10 F. (2d) 711;

*Hass v. United States,* supra;

*Sunderlan* v. *United States,* 19 F. (2d) 202;

*Scheib* v. *United States,* 14 F. (2d) 75;

*Where figures alone appear they refer to pages in the Transcript of Record.

## II.

(Appellant's Brief, pp. 31-34)

DID THE COURT ERR IN OVERRULING THE OBJECTIONS OF APPELLANT TO THE BILL OF PARTICULARS AS FURNISHED BY THE GOVERNMENT AND DENYING APPELLANT'S REQUEST FOR A FURTHER BILL OF PARTICULARS?

The granting of a bill of particulars, or the extent to which a bill of particulars should be furnished, is within the sound judicial discretion of the trial court.

*Muench* v. *United States,* 96 F. (2d) 332;

*Hass* v. *United States,* supra;

*Stumbo* v. *United States,* 90 F. (2d) 828.

We wish to point out that in this case the bill of particulars furnished was not upon order of the Court. When the demand for a bill of particulars was filed, the Government, in order to narrow the issues and save the time of the Court in going over each demand, furnished the appellant and other defendants with the bill of particulars in this record. The appellant thereupon filed objections to the bill furnished and demanded a further bill of particulars. It was upon this objection and demand that the Court entered its order denying the request for a further bill.

In the demand for a bill of particulars, there is much repetition. To these, the Government merely

replied that they had been furnished in reply to prior demands. The bill of particulars furnished (54-71), when read in conjunction with the indictment, fully advised appellant of all facts necessary for the preparation of his defense.

Paragraph III (55) of the bill informed appellant of the misrepresentations made, to whom made and when made. Paragraph VIII (56) of the bill supplements this information. Paragraphs XI, XII, XIII and XVII (57-58) of the bill give full information as to the mailing of the letters. Paragraph XXVI (59) supplements the information contained in the indictment and in paragraph III of the bill of particulars as to the false misrepresentations. Paragraph XXVIII (59-60) outlines Canning's connection with the companies. Paragraphs XIX to XXXII (60-61) itemize withdrawals of cash by each defendant. Paragraph XXXIII (61) gives definite information in connection with the write-up of the mortgage loans. Paragraph XXXV (62) itemizes the cash assets carried in the December, 1936 statement, which were received in 1937. Paragraph XXXVII (63) gives full information in regard to the falsity of the combined balance sheet of June 30, 1937. Paragraph XXXVIII (64-68) sets out in full the letter requested in the demand. Paragraph XLII (68) sets out in detail the falsity of the annual statement of the life insurance company for the year 1936. Paragraphs XLIV and XLV (69) give full particulars as to the falsity of the letter of March 2, 1937. Paragraphs XLVI to XLVIII (70) comply with appellant's demand as to the mailing of the letter of March 2, 1937.

On page 33 of Appellant's Brief, he contends that the answer to the demand in paragraph XLIX (70)

of the bill of particulars is not sufficient because the difference between the two statements referred to is not fairly and fully disclosed (70). The answer to this demand states that the difference between the financial statement referred to in paragraph 5 of the Sixth Count of the indictment and a financial statement referred to in paragraph 3 of the Sixth Count of the indictment is merely in the form of the statements or grouping of the items.

Appellant also complains because the Government was not compelled to furnish appellant with copies of financial statements and reports filed with the Corporation Commission of the State of Arizona or furnish appellant with copies of reports filed with Dunne's Insurance Reports. The trial court evidently felt, and properly so, that the office of the Corporation Commission of the State of Arizona was open to the defendants, and that they were in as good a position as the Government to secure copies of reports or statements filed with such Commission and copies of reports furnished Dunne's Insurance Reports. As a matter of fact, there was no direct evidence at the trial that appellant, or any of the defendants, directly furnished Dunne's Insurance Reports with any financial statements. The statement contained in Dunne's Insurance Reports evidently was based on statements filed with the Arizona Corporation Commission.

Appellant failed to point out a single instance during the trial of the case where he was prejudiced by the lack of any information or that he was placed at any disadvantage by failure of the Government to furnish further information.

Appellant was bookkeeper and auditor (743-744) for the corporations involved and, in addition, he was temporary receiver for the State Securities Corporation (278). All of the books and accounts which were introduced into evidence were brought into court on subpoena issued to the Receiver of State Securities Corporation, Mr. H. T. Cuthbert, and to the office of the Corporation Commission of the State of Arizona, which had possession of the books of account of the insurance company. All of these books and records were available to the appellant and were open to his inspection up to the time of trial.

## III.

(Appellant's Brief, pp. 35-47)

## EVIDIENCE OF ACTS AND DECLARATIONS OF CO-CONSPIRATORS

Appellant opens his argument on this question with the statement that there was no evidence that the appellant entered into any conspiracy.

If this were true, then not only was the evidence of acts and declarations of the co-defendants improperly admitted but the appellant would have been entitled to a directed verdict of not guilty.

Appellant further states that there was no evidence that appellant had any knowledge of such acts or declarations, either before or subsequent thereto. It is not necessary that a conspirator have knowledge of the acts or declarations of his co-conspirators. He may know only his own part of the conspiracy.

*Silkworth* v. *United States,* supra.

The acts and declarations of co-conspirators in furtherance of a conspiracy are admissible against all co-conspirators.

*Morris* v. *United States,* 7 F. (2d) 785;

*Silkworth* v. *United States,* supra;

*Osborne* v. *United States,* 17 F. (2d) 246.

The answer to appellant's contention in regard to the admissibility of this evidence depends upon whether or not there was a conspiracy and whether or not appellant joined it. This necessitates looking at the record. Let us see what part appellant played in this conspiracy. He was a Certified Public Accountant, and kept the books of the State Securities Corporation during practically its entire existence (346). This is admitted by appellant (743). He kept the ledger of the Union Reserve Life Insurance Company and did most of the work in the insurance company's office (286). Government's Exhibit 7 included the annual reports of the Union Reserve Life Insurance Company for the years 1933 to 1936, inclusive. These reports were signed by appellant (303-304). The report for 1936 included a statement for that year prepared by appellant (753). These statements were false in many respects and known by appellant to be false. Still, he certified to them.

The item of $9,251.42, shown as cash on hand December 31, 1936, was false because it included cash collected in January and February, 1937 (267, 625,

756). Canning had knowledge of this fact (761-762). The same false entry occurs in Government's Exhibit 33 (481, 625), and in Government's Exhibit 36 (489, 627).

We wish to call attention to appellant's own testimony (762), in reference to Government's Exhibit 36 (489), which contained the balance sheet of June 30, 1937. Appellant admits that the entry showing cash on hand is false. He also admits that he did not know where the Home Owners' Loan bonds were which were carried as an asset in this statement and in Government's Exhibit 33. These bonds were, in fact, in the bank as collateral security for a loan (724).

Appellant admits that the general practice, before making a certificate to an audit as to assets, is to verify by checking of the actual assets themselves. This he did not do (763).

All of this testimony, together with much other testimony occurring in the record, clearly establishes the fact that appellant not only took part in the conspiracy but played a very important part. Being a Certified Public Accountant, financial statements and reports certified to or signed by him would, naturally, carry weight with the purchasing public, and would make more possible the success of the scheme or conspiracy.

There are many other items in the evidence which we have not discussed; for instance, the item of $105,000.00 "Insurance Inventory", found in combined balance sheet of June 30, 1937 (Government's Exhibit 36). This was purely a fictitious item, put in for the

purpose of padding the assets, and neither Canning, nor any of the other witnesses, has satisfactorily explained what it means.

We have not discussed the fictitious write-up of the mortgage items. Appellant admits making the entries (764). These entries were made after the close of the year 1936.

The trial court and the jury determined from all the evidence that there was a conspiracy as charged and all of the defendants were found guilty. We think the evidence referred to above justifies the verdict of the jury and connects the appellant with the conspiracy.

## IV.

(Appellant's Brief, pp. 47-54)

## ADMISSIBILITY OF BOOKS AND RECORDS UNDER THE PROVISIONS OF SECTION 695, TITLE 28, UNITED STATES CODE ANNOTATED

Appellant further contends that the books and records were not properly admitted in evidence because the requirements of Section 695, Title 28, United States Code Annotated, were not complied with.

The quotation from 16 Corpus Juris 749, on page 49 of Appellant's Brief, is not a correct statement of the rule for the admissibility of books and records under Section 695, Title 28.

The records of the Arizona Corporation Commission were identified by Witness Ethel, Secretary of

the Corporation Commission (245). He testified that they were records of the Arizona Corporation Commission (246-252). The only objection made to the introduction of these exhibits was that they were incompetent and immaterial (246-247). Government's Exhibit 5 (249) was the only exhibit objected to on the ground of improper foundation (250). The witness had identified the exhibits as the records of the Arizona Corporation Commission in reference to the State Securities Corporation (249). This was sufficient to identify them as public records. The records themselves show their materiality.

This Court has held, where documents are not sufficiently identified but are similar to others which have been identified, they are admissible.

*Mitchell* v. *United States,* 23 F. (2d) 260.

On page 53 of Appellant's Brief are listed a number of exhibits which it is contended were not properly admitted. We have heretofore discussed Exhibits 1 to 6, being the records of the Arizona Corporation Commission. As to many of the other exhibits, appellant fails to cite all of the places in the record where testimony is found identifying such exhibits. For example, with reference to Exhibit 12, appellant fails to call attention to the testimony of Mr. Wilson (264), where he states "these entries were made in the regular course of business", and he also testified to the general method which, in itself, shows that the entries were made in the regular course of business (264-265).

As to the other exhibits listed in Appellant's Brief, on pages 53 and 54, in addition to the pages in the

record cited by appellant, we wish to call the Court's attention to other parts of the record affecting such exhibits:

Government's Exhibit 8 (295)

Government's Exhibit 10 (263, 298)

Government's Exhibit 7 (300, 303, 305, 698)

Government's Exhibit 17 (278, 309)

Government's Exhibit 24 (314)

Government's Exhibit 21 (351)

Government's Exhibit 23 (352)

Government's Exhibits 57 and 58 (512)

Government's Exhibit 11 (263, 298)

Government's Exhibit 14 (268)

Government's Exhibit 15 (269)

In addition to the foregoing, we have heretofore shown that Exhibit 7 was prepared in part by appellant and that the entire exhibit was certified to by him.

Government's Exhibit 18 is shown to have been made by appellant and the defendant Raymond F. Marquis (349).

## V.

(Appellant's Brief, pp. 54-58)

## REFUSAL OF THE COURT TO KEEP GOVERNMENT'S WITNESS KING WILSON IN ATTENDANCE UPON THE COURT

The witness King Wilson identified certain books and records that were kept by him, or in which he had made some entries. The purpose of his testimony was to lay the foundation for their introduction in evidence. As to many of these records, it was necessary to have the testimony of other witnesses before the exhibits were admissible.

Appellant complains because Wilson was not kept in attendance at Court for cross-examination until all of the exhibits were introduced in evidence. Any questions which it would have been proper to have asked the witness Wilson at any time during the trial could have been asked him at the close of his direct examination. There is no merit in appellant's contention that he should have been kept at attendance during a long and protacted trial. He cites no authorities sustaining his claim. There was no abuse of discretion on the part of the Court, and appellant has failed to show where he was prejudiced in any manner whatsoever.

## VI.

(Appellant's Brief, pp. 59-60)

DID THE COURT ERR IN RECEIVING OVER APPELLANT'S OBJECTIONS TESTIMONY OF THE GOVERNMENT'S WITNESS E. P. HAIR ON REBUTTAL CONCERNING TRANSACTIONS BETWEEN THE UNION RESERVE LIFE INSURANCE COMPANY AND MARQUIS, CORNES & MARQUIS AND J. ELMER JOHNSON?

It is immaterial whether this testimony was proper rebuttal or whether it should have been introduced

in the case in chief. Its admission in rebuttal was within the sound judicial discretion of the Court.

*Golsby* v. *United States,* 160 U. S. 70; 16 Sup. Ct. 216.

The witness Hair was permitted to testify in regard to what Government's Exhibit 18 disclosed. Government's Exhibit 18 was admitted in evidence in the case in chief (350). The witness also testified from Government's Exhibit 23, admitted in evidence in the case in chief (353). These exhibits disclosed that J. Elmer Johnson had received money from the corporations involved in this case. Johnson was in the employ of the Arizona Corporation Commission up to the early part of 1935 (896). At least part of the transactions with the Corporation Commission regarding the sale of securities was had with Johnson (897). He had made an examination of the company and made a report to the Commision (728-729). The purpose of the testimony of Mr. Hair was to explain to the jury the entries in the books in evidence disclosing transactions between Johnson and the companies involved, in order that the jury might determine whether or not the officers of the company, in using Mr. Johnson's report and relying thereon, were doing so in good faith, in view of the fact that during part of the time, at least, he was receiving payments in cash from the company.

## VII.

(Appellant's Brief, pp. 61-66)

DID THE COURT ERR IN DENYING APPELLANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE GOVERNMENT'S CASE AND AT THE CLOSE OF THE WHOLE CASE?

The motion made at the close of the Government's case was waived by the introduction of evidence in behalf of appellant.

In discussing appellant's argument under Question III (Appellant's Brief, p. 35), we called attention to some of the evidence connecting appellant with the conspiracy. We believe that our argument under that topic is sufficient answer to appellant's contention that he was entitled to a directed verdict. However, to summarize briefly; appellant kept the books of the State Securities Corporation and made entries in and audited the books of the Union Reserve Life Insurance Company. He prepared financial statements and reports as to both companies. These reports and statements were false in many particulars and were known by appellant to be false. He testified that he knew that the purpose of his audits was to have people rely upon his certificate as a Certified Public Accountant (763). He admitted that he did not verify the assets, such as the Home Owners' Loan bonds (763), which were, in fact, up for collateral security. He also admitted the false entry in regard to the cash on hand December 31, 1936 (762).

These acts alone were sufficient to prove his guilt. When we read the entire record and view it as a whole, the evidence of his guilt is conclusive.

## VIII.

(Appellant's Brief, pp. 66-73)

DID THE COURT ERR IN INSTRUCTING THE JURY AND IN REFUSING APPELLANT'S REQUESTED INSTRUCTION?

Assignment of Error LXXIV (213):

In reading the instruction complained of, we must read it in connection with the instruction just preceding it (923-924). There the Court defines the responsibility for representations with the qualifications mentioned in Appellant's Brief on page 68. All that the instruction complained of does is to say that one who adopts and uses the statements of others is equally responsible therefor. It necessarily follows that the same qualification applies to adopted statements as to those originally made.

Assignment of Error LXXV (214):

The instruction here complained of (908-911) when read as a whole, is favorable to appellant. It reiterates the doctrine of reasonable doubt, and the portion quoted in Appellant's Brief on page 69 carefully points out that jurors cannot find guilt by preponderance of evidence but that it must be shown to a moral certainty.

Assignment of Error LXXVI (217):

This instruction (912-913) is a stock instruction in mail fraud cases. There is no inference, as appellant says, that fraud exists regardless of the evidence.

Assignment of Error LXVII (218):

The instruction complained of in this assignment (916) follows this statement:

> " * * * the Government must, however, show by proof convincing you beyond a reasonable doubt that as to one or more of the separate lines of

activities in which one or more of the defendants participated, there did come into activity a scheme or schemes to obtain money or property by means of false pretenses, etc,"

and just prior to that the Court carefully defined the things necessary to constitute the offense charged in the first five counts of the indictment (914-915). Appellant was acquitted on each of these counts.

Assignment of Error LXXVIII (218-219):

This instruction (923) states the fundamental principle of law in mail fraud cases and has none of the faults charged in Appellant's Brief.

Assignment of Error LXXIX (219):

Appellant has misread and misinterpreted the instruction here complained of (925). It clearly states that an employee must have knowledge of the unlawful scheme to defraud. In addition, on this same point, the Court gave this further instruction (928-929):

"You have been instructed that any person who takes part in the carrying out of a scheme to defraud, such as bookkeepers, stenographers, or salesmen can be convicted as a principal. This does not mean that every employee of the company wherein some of the officers had devised a scheme to defraud, can be convicted for carrying out such a scheme under the supervision of the officers who might have devised such a scheme, nor that all the officers of the corporation or corporations not engaged in such scheme, can be convicted therefor,

but in order to convict such employee or officers, it is incumbent upon you to find that they had joined in effecting of such scheme, or that they had become acquainted with the scheme or device before the letters charged in the various counts of the indictment were mailed, and thereafter performed some act calculated to further carry out the scheme to defraud alleged in the indictment with the intent and knowledge that such act would be so effective."

Assignment of Error LXXX (220):

The appellant objects to that part of the instruction which reads as follows (939-940):

"Where a witness has a direct personal interest in the result of a case, especially in a criminal case, the temptation may be strong to color, pervert or withhold the facts."

This statement is based upon years of experience in criminal cases. It did not take away from the jury their right to determine in this particular case whether or not the appellant was speaking the truth. This instruction has been given in many criminal cases in Federal Courts and we have been unable to find any case in which it has been criticized.

Assignments of Error LXXXI to XCVII (221 to 234):

These asignments cover instructions requested by appellant. All of the instructions requested by appellant which correctly stated the law of the case were

given by the Court, or were included in other instructions. A reading of the Court's instructions as a whole will disclose that they were eminently fair and favorable to appellant.

## IX.

(Appellant's Brief, p. 73)

DID THE COURT ERR IN REFUSING TO STRIKE FROM THE TESTIMONY THE EXHIBITS ADMITTED IN EVIDENCE ON BEHALF OF THE GOVERNMENT?

This question is answered in our argument in this brief replying to appellant's contention that the Court erred in admitting such exhibits in evidence. There is no necessity for repeating that argument.

## CONCLUSION

It is respectfully submitted that the evidence clearly establishes the guilt of appellant; that he had a fair and impartial trial; that no prejudicial error was committed, and that the judgment should be affirmed.

Respectfully submitted,

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